80-1317

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY JOSEPH BENSON

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a warrantless search of an unlocked container within reach of an arrestee, conducted contemporaneously with a lawful arrest, may be upheld as a search incident to that arrest.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–15a) is reported at 631 F.2d 1336. The opinion of the district court (App. D, *infra*, 18a–27a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on September 18, 1980. A petition for rehearing was denied on November 7, 1980 (App. C, *infra*, 17a). On December 31, 1980, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including February 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, respondent was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to three years' imprisonment, to be followed by a three-year term of special parole.

Prior to trial, respondent moved to suppress a quantity of cocaine seized by law enforcement officers at the time of his arrest. The evidence at the suppression hearing showed that Sandy Sandefer, a police informant, arranged with Bruce Bell to purchase eight ounces of cocaine, which were to be delivered to Sandefer at the Little Rock Municipal Airport by an individual named "Jeff." Sandefer told the police that Jeff would be arriving from Fort Lauderdale, Florida, at about 6:00 p.m. on August 27, 1979, and most likely would be carrying the drugs in a

brown leather or vinyl tote bag, which Jeff had used to deliver cocaine to Sandefer on two previous occasions (H. Tr. 7–8, 15–16, 55–56, 67–68, 79, 87).[1] Bell was also expected to arrive at the airport at about the same time on a flight from California (H. Tr. 7–8, 12–13, 20, 73–74).

On August 27, 1979, at about 5:40 p.m., law enforcement officers observed Sandefer meet respondent at the Little Rock airport. Respondent, who was carrying a brown leather tote bag, matched the physical description of "Jeff" that Sandefer had given to the police (H. Tr. 16, 105, 113). Respondent and Sandefer walked together to Sandefer's car, a four-door compact station wagon. Respondent placed the tote bag on the passenger side of the rear seat of the vehicle and sat down in the front seat on the same side. Sandefer then sat in the driver's seat and gave a pre-arranged signal to the officers that respondent had the cocaine in his possession (H. Tr. 16–17, 88–92, 113–115).

At that point, four officers approached the car. One of the officers, state narcotics investigator Sanders, opened the door on respondent's side, identified himself as a police officer, informed respondent that he was under arrest, and ordered him out of the car. Respondent did not move; officer Sanders repeated his order but respondent still did not move. As officer Sanders leaned into the car to pull respondent out, respondent leaned back, turned sideways toward Sanders, and moved his right arm to the top of the front seat. Officer Sanders believed that respondent was reaching into the rear seat for a weapon or for the tote bag, which was within two and one half to three feet of respondent's hand. As soon as respondent made the movement with his arm, police detective Hutchinson opened the rear door of the vehicle on respondent's side and seized the tote bag. Detective Hutchinson looked inside the tote bag and found a small, partially open blue

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[1] The informant described "Jeff" as approximately 5 feet 10 inches tall, weighing about 170 pounds, with a moustache and brown hair parted in the center (H. Tr. 67, 88). "H. Tr." refers to the transcript of the suppression hearing.

pouch inside of which was a clear plastic bag containing cocaine. Meanwhile, officer Sanders removed respondent from the vehicle and placed him in a search position with his hands on top of the car. While officer Sanders was in the process of searching respondent's person, respondent turned around and Sanders immediately placed respondent back in the search position (H. Tr. 92–96, 115–118).

The district court denied respondent's motion to suppress the cocaine (App. D, *infra*, 18a–27a). The court found that respondent had been reaching for the tote bag immediately prior to the search (*id.* at 22a) and concluded that the warrantless search of the tote bag, which was within respondent's area of immediate control, was justified as a search incident to a lawful arrest (*id.* at 24a–25a, 27a).[2]

A divided panel of the court of appeals reversed (App. A, *infra*, 1a–15a). Relying on this Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and on its prior en banc decisions in *United States* v. *Schleis*, 582 F.2d 1166 (1978), and *United States* v. *Stevie*, 582 F.2d 1175 (1978), cert. denied, 443 U.S. 911 (1979), the majority held that the search of the bag could not be justified as incident to respondent's arrest.[3] The majority ruled that the bag was not "immediately associated" with respondent's person when it was seized, since respondent was in the front seat and the bag was in the rear seat of the car at the time of the seizure (App. A, *infra*, 7a). Moreover, the court concluded that the bag was within the officers' exclusive control at the time of the search, "and there was no longer any danger that [respondent] Benson might gain access to the bag to destroy evidence or grab a weapon" (*id.* at 8a). It accordingly ruled that "[o]nce the police officers seized

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[2]The district court rejected respondent's argument that informant Sandefer was unreliable and that therefore the arrest was not supported by probable cause (App. D, *infra*, 25a–27a).

[3]The majority assumed that the informant was reliable and that respondent was properly arrested on probable cause (App. A, *infra*, 2a n.1).

the bag and exercised exclusive control over it, they should have delayed searching it until judicial approval had been obtained" (*ibid.*).

Judge Gibson dissented (App. A, *infra*, 8a–14a). He concluded that because the tote bag was within respondent's immediate control at the time of arrest, and the search was contemporaneous with the arrest, the warrantless search was permissible as incident to respondent's arrest under principles articulated in *United States* v. *Robinson*, 414 U.S. 218 (1973), and *Chimel* v. *California*, 395 U.S. 752 (1969). In his view, the majority erred in its reliance on *United States* v. *Chadwick*, *supra*, and *Arkansas* v. *Sanders*, *supra*, which did not involve searches incident to arrest. Judge Gibson observed that "[u]nder the majority's analysis, * * * [respondent] would have to have been *successful* in his attempt to grab the bag before it could be seized and searched" (App. A, *infra*, 12a; emphasis in original). He pointed out that the majority's approach was inconsistent with this Court's definition of "immediate control" as the " 'area into which an arrestee might reach in order to grab a weapon or evidentiary item' " (*ibid.*, quoting from *Chimel* v. *California*, *supra*, 395 U.S. at 763). Finally, Judge Gibson noted that under the majority's ruling that searches of luggage or other types of containers may not be justified as incident to arrest once the police have obtained exclusive control of the container, law enforcement officers would be prevented in almost all cases from discovering weapons or contraband inside containers within an arrestee's immediate control, since "[o]bviously the police must obtain possession of any container-type article before it can be searched * * * " (App. A, *infra*, 14a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals raises an important question of Fourth Amendment law similar to that now before the Court in *New York* v. *Belton*, cert. granted, No. 80-328 (Jan. 19, 1981). The facts in *Belton* showed that a car with four occupants was stopped for traffic vio-

lations by a state trooper. Upon approaching the car, the officer detected the odor of marijuana and observed on the floor of the car an envelope of a type commonly used to sell the drug. After ordering the occupants out of the vehicle, the officer patted each of them down and retrieved the envelope, which contained marijuana. At that point the officer formally placed the four individuals under arrest. He then reentered the car, searched several jackets on the rear seat, and discovered cocaine and Belton's identification in the zippered pocket of one jacket.

A majority of the New York Court of Appeals ruled that the warrantless search of the zippered pockets of the jacket could not be upheld as a search incident to a lawful arrest because the jacket was within "the exclusive control of the police," the occupants had been effectively neutralized, and there was no longer any danger that they might gain possession of the jacket either to obtain a weapon or to destroy evidence. Relying on *Arkansas* v. *Sanders*, *supra*, and *United States* v. *Chadwick*, *supra*, the majority concluded (80–328 Pet. App. A–8 to A–9; footnote and citations omitted):

> That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute * * *. Defendant's arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest * * *. The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent. There was, therefore, no reason why the search should not have awaited the issuance of a warrant.

The dissenting judges noted (80–328 Pet. App. A–11) that, at the time of the search of Belton's jacket, "[t]he situation was still fluid, and neither the suspects themselves nor

their property had as yet been reduced to the exclusive and certain control of the police." Because of the potential for danger or for destruction of evidence while the officer was in the process of arresting four unknown individuals, the dissenters concluded that the search was proper as incidental to the arrest.

Belton appears to raise, on somewhat similar facts, the same general Fourth Amendment issued that is present in this case, *i.e.*, whether a warrantless search by police of an unlocked container seized from the vicinity of an arrestee may be upheld as incident to arrest when the search is conducted contemporaneously with the arrest.[4] Thus, the decision in *Belton* may well control this case. However, there are a number of factual differences between the two cases, and, accordingly, it is conceivable that the outcome in *Belton* might not be dispositive here. First, in *Belton* the container searched was a jacket pocket, while here it was a piece of luggage. Second, *Belton* involves a situation in which a single officer confronted four unknown arrestees, whereas in this case four officers were present to as-

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[4]Prior to the decision in *United States* v. *Chadwick*, *supra*, the courts of appeals had upheld such searches, so long as the container was either in the arrestee's possession or within his reach at the time of the arrest. See, *e.g.*, *United States* v. *French*, 545 F.2d 1021 (5th Cir. 1977); *United States* v. *Eatherton*, 519 F.2d 603, 609–610 (1st Cir.), cert. denied, 423 U.S. 987 (1975); *United States* v. *Kaye*, 492 F.2d 744, 746 (6th Cir. 1974); *United States* v. *Ciotti*, 469 F.2d 1204, 1206–1207 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1974). After *Chadwick*, the circuits have generally adhered to that position. See, *e.g.*, *United States* v. *Graham*, No. 80–1206 (7th Cir. Jan. 27, 1981); *United States* v. *Allen*, 629 F.2d 51, 58 (D.C. Cir. 1980); *United States* v. *Garcia*, 605 F.2d 349 (7th Cir. 1979), cert. denied, No. 79–6035 (June 2, 1980); *United States* v. *Foster*, 584 F.2d 997, 1001–1002 (D. C. Cir. 1978); *United States* v. *Moreno*, 569 F.2d 1049, 1052 (9th Cir.), cert. denied, 435 U.S. 972 (1978); *United States* v. *Dixon*, 558 F.2d 919, 922 (9th Cir. 1977), cert. denied, 434 U.S. 1063 (1978). But see *United States* v. *Neumann*, 585 F.2d 355, 359–360 (8th Cir. 1978); cf. *United States* v. *Calandrella*, 605 F.2d 236, 249 (6th Cir.), cert. denied, 444 U.S. 991 (1979) (dictum); *United States* v. *Mancillas*, 580 F.2d 1301, 1306 (7th Cir.), cert. denied, 439 U.S. 958 (1978) (dictum); *United States* v. *Berry*, 560 F.2d 861 (7th Cir. 1977), vacated, 571 F.2d 2 (7th Cir. 1978).

sist in the arrest of a single suspect.[5] Third, in *Belton*, the arrestees had already been removed from the car and patted down before the officer seized and searched the jackets inside the vehicle. Here, on the other hand, respondent was still inside the car and appeared to be reaching for the tote bag when one of the officers seized and searched it. In light of these factual distinctions, it is difficult to predict with certainty whether the decision in *Belton* will necessarily govern this case.

The Court should hold this petition pending its decision in *Belton*. If this Court concludes in *Belton* that a warrant was not required to search the zippered jacket incidental to Belton's arrest, it should grant certiorari in this case and either reverse the judgment of the court of appeals or, if appropriate, either set this case for plenary consideration or remand for reconsideration in light of the decision in *Belton*. Because of the factual differences between the two cases, however, even if the Court were to affirm the judgment of the New York Court of Appeals in *Belton*, affirmance in this case would not necessarily follow.

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[5] Although only respondent was arrested, Sandefer, the informant, was also present at the scene of the arrest, and respondent's accomplice Bruce Bell was expected to arrive at the airport at about the same time as respondent.

CONCLUSION

The Court should defer consideration of this petition pending its decision in *New York* v. *Belton* and should then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 1981

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 80-1044

UNITED STATES OF AMERICA, APPELLEE,

v.

JEFFREY JOSEPH BENSON, APPELLANT.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: May 23, 1980

Filed: September 18, 1980

Before: GIBSON, Senior Circuit Judge, and HEANEY and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

Jeffrey Benson appeals from his conviction of possession with intent to distribute and conspiracy to distribute cocaine. We reverse the conviction because the warrantless search of Benson's luggage in the absence of exigent circumstances was unreasonable and in violation of the Fourth Amendment.

I

Benson was arrested on August 27, 1979, while sitting in a car parked at the Little Rock Municipal Airport. Sandy Sandefer, who was sitting in the driver's seat of the vehicle, had previously given police information that a "Jeff" would arrive at the airport carrying a quantity of cocaine, and police had undertaken an investigation. Sandefer had told the police that Benson would be carrying a brown leather or vinyl tote-type bag and that the bag had been used on previous occasions to transport cocaine from "Jeff" to Sandefer. Benson was indeed carrying a brown leather tote bag when Sandefer met him at the airport. Sandefer took Benson to Sandefer's car, a four-door compact station wagon. Benson placed his bag on the passenger side of the back seat of the vehicle and sat down in the front seat on the same side. Sandefer sat down in the driver's seat. He then communicated to the waiting police, by a prearranged signal, his belief that Benson possessed the cocaine.[1]

At that point, four police officers came to the car. They had neither applied for nor received arrest or search warrants. State police narcotics investigator Sanders opened the door alongside Benson and told him that he was under arrest and should get out of the car. Benson made no movement; Sanders repeated the order; Benson still made no movement. As Sanders leaned into the car to remove Benson, Benson turned slightly sideways and moved his arm to the top of the front seat. Sanders physically took Benson out of the vehicle and placed him in a search position with his hands on top of the vehicle. Simultaneously, police detective Hutchinson opened the back door of the vehicle on the passenger side and seized the tote bag. While Sanders was beginning to search Benson, Benson turned around; Sanders immediately put Benson back in the search position and completed searching Benson's person. Detective Hutchinson, meanwhile, had opened Ben-

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[1] We assume that the informant was reliable and that Benson was properly arrested upon probable cause.

son's tote bag. In it, he found shaving articles, small cologne bottles, some papers and a small blue drawstring bag bearing the words "Rich Lights." Hutchinson felt the small, blue bag and determined that it contained a soft, powdery substance. He looked in the end of the bag, which was not tightly drawn, and saw a plastic bag containing a white powder that, on subsequent analysis, proved to be cocaine.

Our concern is whether the warrantless search of Benson's tote bag was constitutionally permissible.

II

The Fourth Amendment requires that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause." *Arkansas v. Sanders*, 442 U.S. 753, ____, 61 L.Ed.2d 235, 241 (1979). This requirement is not a technicality; it "reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.' " *Id.* (quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972)). By requiring that determinations of probable cause and the scope of a search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), we "minimize the risk of unreasonable assertions of executive authority." *Arkansas v. Sanders*, *supra*, 442 U.S. at ____, 61 L.Ed.2d at 241.

Some exceptions to the warrant requirement exist; however, they are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), and "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Further, the Court has "limited the reach of each exception to that which is necessary to accommodate the identified needs of society." *Arkansas v. Sanders*, *supra*, 442 U.S. at ____, 61 L.Ed.2d at 242; *see Mincey v. Arizona*, 437

U.S. 385, 393 (1978); *United States v. Chadwick*, 433 U.S. 1, 15 (1977). One exception that has been sustained is the so-called "automobile exception," which authorizes police to stop an automobile on the street or highway if they have probable cause to believe it contains contraband or evidence of a crime. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 561-562 (1976); *Carroll v. United States*, 267 U.S. 132, 153 (1925). This exception has, in certain instances, been extended to searches of "some integral part of the automobile." *Arkansas v. Sanders, supra*, 442 U.S. at _____, 61 L.Ed.2d at 244. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364, 366 (1976)(glove compartment). It does not, however, extend to the search of luggage seized from automobiles in the absence of some other exigency. *Arkansas v. Sanders, supra; United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979). Luggage, because of its nature as a "common repository for one's personal effects, * * * is inevitably associated with the expectation of privacy." *Arkansas v. Sanders, supra*, 442 U.S. at _____, 61 L.Ed.2d at 244; *see id., n.9; United States v. Chadwick, supra*, 433 U.S. at 13.

United States v. Chadwick, supra, and *Arkansas v. Sanders, supra*, held the warrantless searches of a footlocker and a suitcase, respectively, to be constitutionally impermissible. Relying on one or both of those cases, the courts have held illegal the warrantless searches of a variety of "types of containers normally associated with personal luggage," *United States v. Ross*, No. 79-1624, slip op. at 9 (D.C. Cir., Apr. 17, 1980), including a suitcase,[2] a briefcase,[3] a duffle bag,[4] a backpack,[5] a leather pouch,[6] and a portfolio.[7]

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[2]*E.g., United States v. Montano*, 613 F.2d 147 (6th Cir. 1980)(per curiam); *United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978).

[3]*United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979); *United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978); *cf. United States v. Haley*, 581 F.2d 723 (8th Cir.) *cert. denied*, 439 U.S. 1005 (1978) (exigent circumstances; defendant was unconscious and police sought identification or medical alert cards).

(See footnotes next page).

We feel that Benson had a justifiable expectation of privacy in the contents of his brown leather tote bag. Although the bag was fairly small and unlocked, its "fundamental character as a repository for personal, private effects"[8] is unchanged. In the absence of exigent circumstances, the search of the bag without a warrant violated the Fourth Amendment.

III

The government contends, nevertheless, that the search of Benson's luggage was proper because it was incident to his arrest, *see United States v. Robinson*, 414 U.S. 218 (1973), and because the bag may have contained contraband that the defendant could destroy or weapons that he could use against the police. *See Chimel v. California*, 395 U.S. 752 (1969).

In *United States v. Stevie*, *supra*, we held that the warrantless search of a suitcase in the rear of the station wagon in which defendants were riding was not justified as incident to their arrest, because the suitcase had come under the officers' control and no exigent circumstances required a search at the scene of the arrest. 582 F.2d at 1180. In *United States v. Schleis*, 582 F2d 1166 (8th Cir. 1978), we invalidated the warrantless search of Schleis' briefcase at the station house after his arrest "because the search * * * came after the briefcase had come under the

[4] *United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979).

[5] *United States v. Meier*, 602 F.2d 253 (10th Cir. 1979).

[6] *United States v. Ross*, No. 791624 (D.C. Cir., Apr. 17, 1980).

[7] *United States v. Miller*, 608 F.2d 1089 (5th Cir. 1979).

[8] In the present case, respondent's comparatively small unlocked suitcase also had been placed in the trunk of an automobile and was searched without a warrant by police acting upon probable cause. We do not view the difference in the sizes of the footlocker and suitcase as material here; nor did respondent's failure to lock his suitcase alter its fundamental character as a repository for personal, private effects.

Arkansas v. Sanders, 443 U.S. 753, _____n. 9, 61 L.Ed.2d 235, 244 n.9 (1979).

exclusive control of the police * * *." *Id.* at 1172. We stated:

> *Chadwick* establishes * * * that the justification for a search under *Chimel* evaporates once the officers seize the luggage or other personal property and reduce it to their exclusive control. *United States v. Jackson,* [576 F.2d 749 (8th Cir. 1978)]. As the Court held in *Chadwick,*
>
> > warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest,"* * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.
>
> *United States v. Chadwick, supra,* 433 U.S. at 15, 97 S.Ct. at 2485.
>
> *Chadwick* establishes that the critical factor is the extent to which the property is within the control of the law enforcement officers, rather than the amount of time or space between the arrest and the search. *United States v. Ester,* 442 F. Supp. 736, 739 (S.D.N.Y. 1978). *Once the officers obtain exclusive control, the requirement for a warrant under Chadwick is triggered. Ordinarily, the initial seizure at the time of arrest would be sufficient to place the property within the officers' exclusive control.* To otherwise interpret *Chadwick* "would enable police and federal agents to circumvent the *Chadwick* holding by encouraging them to conduct a search of luggage at the time and location of the seizure in conjunction with a lawful arrest." Note, *Criminal Procedure–Search and Seizure–Persons Lawfully Arrested for Alleged Possession of Narcotics have a Privacy Interest in a Footlocker in Their Possession at the Time of Their Arrest which is Protected by the War-*

rant Clause of the Fourth Amendment. United States v. Chadwick, 6 Am.J.Crim.Law 81, 94 (1978)* * * .

United States v. Schleis, supra, 582 F.2d at 1171-1172 (emphasis added).

In *Arkansas v. Sanders, supra*, the Court reiterated this proposition. It determined that no exigency of mobility was present where the defendant was in custody and the luggage was in the officers' control, saying, "the exigency * * * must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control." 442 U.S. at _____, 61 L.Ed.2d at 244-245.

At the outset, we must distinguish the seizure of the tote bag, which is constitutionally unobjectionable, from the search of the bag itself. The Court in *Sanders* also noted that distinction, saying, "Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained the contraband.* * * the only question, therefore, is whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a warrant for the search." *Id.*, 442 U.S. at _____, 61 L.Ed.2d at 243-244.

We have carefully examined the record, including the testimony of the officers who seized Benson and searched his luggage, and conclude that the officers should have obtained a warrant before searching the tote bag. The bag was not "immediately associated with the person of the arrestee," *United States v. Chadwick, supra*, 433 U.S. at 15, either at the time the luggage was seized or at the time it was searched. At the time the tote bag was seized, Benson was seated in the front seat of the vehicle and the bag was in the back seat.[9] At the time the tote bag was

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[9] In *United States v. Garcia*, 605 F.2d 349 (7th Cir. 1979), the Seventh Circuit upheld, as incident to arrest, a warrantless search of defendant's suitcases. At the time she was stopped by the police, she

searched, Officer Sanders had removed Benson from the car and had placed him in a search position outside the car. Officer Hutchinson had seized the bag from the back seat of vehicle. The bag was clearly under Officer Hutchinson's exclusive control at the time he opened and searched it, and there was no longer any danger that Benson might gain access to the bag to destroy evidence or grab a weapon. Benson had no accomplices who might have opened the bag to remove weapons or contraband,[10] and there is no allegation that the bag held "instrumentalities which could be dangerous even when sitting idly in the police locker." *United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th Cir. 1979). Once the police officers seized the bag and exercised exclusive control over it, they should have delayed searching it until judicial approval had been obtained.

Accordingly, Benson's convictions are reversed.

GIBSON, Senior Circuit Judge, dissenting.

The factual circumstances attendant to the arrest of Jeffrey Benson remove the search of Benson's tote bag from the ambit of the recent container cases relied upon by the majority opinion. *See Arkansas v. Sanders*, 442 U.S. 753, 763 n.11 (1979); *United States v. Chadwick*, 433 U.S. 1, 14–15 (1977). This case involves a search incident to arrest wherein the tote bag was in the "immediate control" of Benson at the time of his arrest. The relevant standards for such searches are found in *United States v. Robinson*, 414 U.S. 218 (1973) and *Chimel v. California*, 395 U.S. 752 (1969). Under *Chimel*, *id.* at 763, a search incident to an arrest may include not only the person involved but

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was carrying the suitcases. At the time of the search, she was standing one foot from them. As noted in *United States v. Presler*, 610 F.2d 1206, 1213 n.8 (4th Cir. 1979), it is doubtful whether *Garcia* can be reconciled with *Sanders*.

[10] In *United States v. Matlock*, 558 F.2d 1328, 1330–1331 (8th Cir.), *cert. denied*, 434 U.S. 872 (1977), we approved the warrantless search of an open briefcase that was in the immediate control of the arrestee's wife and daughter. Two guns had already been found and the arrest and search took place in a van at night.

also "the area into which an arrestee might reach in order to grab a weapon or evidentiary items * * * ." The Court construed the area "within his immediate control" to mean "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* Since the tote bag was within Benson's immediate control at the time the officers approached him, both the seizure and subsequent search of the bag were proper.

The majority opinion fails to distinguish a warrantless search incident to arrest from probable cause to engage in a warrantless search of an automobile when no probable cause to arrest an occupant exists. Justice Blackmun, in his dissenting opinion in *Arkansas v. Sanders, supra,* 442 U.S. at 771–72, foresaw the confusion that the *Chadwick-Sanders* rules may engender:

> The impractical nature of the Court's line drawing is brought into focus if one places himself in the position of the policeman confronting an automobile that properly has been stopped. In approaching the vehicle and its occupants, the officer must divide the world of personal property into three groups. If there is probable cause to arrest the occupants, then under *Chimel v. California,* 395 U.S. 752 (1969), he may search objects within the occupants' immediate control, with or without probable cause. If there is probable cause to search the automobile itself, then under *Carroll* and *Chambers* the entire interior area of the automobile may be searched, with or without a warrant. But under *Chadwick* and the present case, if any suitcase-like object is found in the car outside the immediate control area of the occupants, it cannot be searched, in the absence of exigent circumstances, without a warrant.
>
> The inherent opaqueness of these "principles," in terms of the policies underlying the Fourth and Fourteenth Amendments, and the confusion to be created for all concerned, are readily illustrated. * * * *Or suppose there is probable cause to arrest persons seated in the front seat of the automobile, and a suitcase rests on the back seat. Is that suitcase within the area of immediate control, such that the*

> *Chadwick-Sanders rules do not apply?* Or suppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, a duffelbag, a cardboard box, a backpack, a tote-bag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? The problems of distinguishing between "luggage" and "some integral part of the automobile," *ante*, at 763; between luggage that is within the "immediate control" of the arrestee and luggage that is not; and between "personal luggage" and other "containers and packages" such as those most curiously described, *ante*, at 764–65, n. 13, will be legion. The lines that will be drawn will not make much sense in terms of the policies of the Fourth and Fourteenth Amendments. And the heightened possibilities for error will mean that many convictions will be overturned, highly relevant evidence again will be excluded, and guilty persons will be set free in return for little apparent gain in precise and clearly understood constitutional analysis. [Emphasis added.]

The majority opinion in *Sanders* expressly recognized this distinction.

> Nor do we consider the constitutionality of searches of luggage incident to the arrest of its possessor. See, *e.g.*, *United States v. Robinson*, 411 U.S. 218 (1973). The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his "immediate control" at the time of the search.

Arkansas v. Sanders, supra, 442 U.S. at 763-64 n.11.

In the present case there was ample evidence presented that the informant was reliable and that Benson was properly arrested upon probable cause. *See Draper v. United States*, 358 U.S. 307, 313 (1959). The question then remains whether the tote bag was in Benson's "immediate control." The district court, implicitly, found this to be the case. The majority's reiteration of the facts supports this finding.

Benson was observed carrying the tote bag with him into the car, a Honda station wagon. The police officers approached the door alongside Benson and told him to get out. "Benson made no movement; Sanders repeated the order; Benson still made no movement. As Sanders leaned into the car to remove Benson, Benson turned slightly sideways and moved his arm to the top of the front seat. Sanders physically took Benson out of the vehicle and placed him in a search position with his hands on top of the vehicle. Simultaneously, police detective Hutchinson opened the back door of the vehicle on the passenger side and seized the tote bag." *Ante* at 2–3. The officers then searched both the bag and Benson. In the bag they found a draw bag labeled "Rich Lights," a brand of cigarettes. From the outside, the contents felt powdery. One of the officers then inspected the bag. Finally, the officers found a knife on Benson's person.

To repeat, the district court specifically found, as a finding of fact, that "[a]s the officers approached the [Honda] vehicle the man turned and reached for the brown bag he had been carrying." Anyone who has ever sat in the back seat of a Honda, even a station wagon, has realized the extremely close proximity of the back seat to the front seat. There can be no doubt that a person sitting in the front seat of a Honda can easily grab or "reach in" a bag resting on the back seat. The luggage involved was not a locked and latched suitcase or trunk, *see United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978), but rather an easily opened tote bag. It would be foolhardy for an arresting officer not to seize and search an "area into which an arrestee might reach in order to grab a weapon or evidentiary items," *Chimel, supra*, 395 U.S. at 763. Furthermore, the officer's suspicion that Benson might be carrying a weapon was confirmed; a knife was found on his person.

It is important to distinguish a warrantless search incident to arrest from the automobile exception to the necessity for obtaining a warrant when probable cause exists to search the vehicle but not arrest the occupant. In a search

incident to an arrest, the privacy interests of the arrestee have already been invaded by the arrest. Furthermore, the "danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody" than in *Terry*-type stops involving automobiles. *United States v. Robinson*, 414 U.S. at 234-35.

When Benson reached for the tote bag, the officers had the right to seize and search. Under the majority's analysis, *ante* at 9, Benson would have to have been *successful* in his attempt to grab the bag before it could be seized and searched. This simply is not the definition of "immediate control" under *Chimel*, *supra* at 763; *ante* at 11, which includes that "area into which an arrestee might reach in order to grab a weapon or evidentiary item * * *."

Finally, the majority opinion emphasizes that at the time the bag was "searched," as opposed to "seized," the bag was under the exclusive control of one of the officers and therefore there was no longer any danger that Benson might gain access to the bag. This fact, however, the Supreme Court has held, does not render the search invalid. In *United States v. Robinson*, 414 U.S. 218 (1973), an individual was searched incident to an arrest. In a search of his person, the officer came across a cigarette package. *After removing* it from the arrestee's pocket, the officer felt the package and knew that it did not contain cigarettes. The officer then opened the package and found heroin. The Court ruled upon the search, finding:

> Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct. *Harris v. United States*, 331 U.S., at 154-155, *Warden v. Hayden*, 387

U.S. 294, 299, 307 (1967); *Adams v. Williams*, 407 U.S., at 149.

United States v. Robinson, 414 U.S. 218, 236 (footnotes omitted).

The same reasoning applies in Benson's case. The officer seized the bag within Benson's "immediate control." He then inspected it and found a draw bag labeled "Rich Lights," ironically a brand of cigarettes. The officer felt the bag from the outside and believed it contained a powdery substance, obviously not cigarettes. He then proceeded to open the bag and confirm his belief that a powdery substance was inside. This type of search was specifically held permissible under the Fourth Amendment in *United States v. Robinson*. The language from *United States v. Chadwick*, 437 U.S. at 15, quoted by the majority, *ante* at 7, is simply inapplicable to the present case, but is indicative of the confusion caused by *Chadwick* in enforcing the criminal laws.

In *Chadwick*, the Court specifically found that "the footlocker was not within the respondent's immediate control." 433 U.S. at 14. The Court then went on to cite *Chimel* and *United States v. Robinson* for the proposition that searches of areas within the immediate control of the arrestee are valid whether or not there is probable cause to believe that the person may have a weapon or is about to destroy evidence. The Court did caution, however, that warrantless searches of "luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is removed in time or place from the arrest.' " *Id.* at 15, *see ante* at 7, 9. Here the Court was distinguishing the case before it, where the footlocker was *not* in the immediate control of the arrestee at the time of the arrest when the footlocker was seized, from the *Chimel-Robinson* situation when the property was within the arrestee's immediate control.

In this case there was actually no reason to search Benson unless the police had probable cause to believe Benson did have possession of narcotics. For all concerned, Benson, the police, and the public, it is better to

view this warrantless search as reasonable under the strictures of the Fourth Amendment, which holds unlawful only "unreasonable searches and seizures." If the search of the tote bag produced what appeared to be narcotics, Benson would continue under arrest and he would be held to account for his undoubted criminal activities. If, on the other hand, the search proved negative, he would in all probability be then and there released and free to go about his business. In turn the police and the courts would also be free to pursue other matters, thus adding to their efficiency and the common weal. More important, under the apparent view of the majority that there can never be a warrantless search of luggage or any container-type article where the police officer has obtained possession of that article, the police are effectively handicapped from finding weapons or contraband that are in some type of container within the arrestee's immediate control. Obviously the police must obtain possession of any container-type article before it can be searched, and if the view is taken that once it is in the officer's exclusive possession the long, tedious process then comes into play of a trip to the police station, a search for a "detached" magistrate, the application for a search warrant, and a possible hearing before the magistrate, this effectively removes the police officers from carrying on their assigned duties of enforcing the criminal laws. One can only conjecture as to the number of warrants needed in a particular case, given the number of "containers" an arrestee may have in his "immediate control" at the time of arrest, in which evidence or a weapon might be concealed.

To my mind, the search in this case was certainly a reasonable one, given the fact that probable cause existed to arrest Benson. If the highly refined interpretation of reasonable searches under the Fourth Amendment by the courts cannot accommodate a search of this type, the public has good cause to question the fairness and efficacy of our criminal enforcement system.

I would find the search of the tote bag valid and, therefore, would affirm the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1980

No. 80-1044

UNITED STATES OF AMERICA, APPELLEE,

vs.

JEFFREY JOSEPH BENSON, APPELLANT.

Appeal from the United States District Court for the Eastern District of Arkansas.

[Filed Sept. 18, 1980, Robert D. St. Vrain, Clerk]

JUDGMENT

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Arkansas and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and commitment of the said District Court, in this cause, be, and the same is hereby reversed in accordance with the opinion of this Court.

September 18, 1980

APPENDIX C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 80-1044

UNITED STATES OF AMERICA, APPELLEE,

v

JEFFREY JOSEPH BENSON, APPELLANT.

Appeal from the United States
District Court for the
Eastern District of Arkansas.

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

November 7, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-CR—79-74

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY JOSEPH BENSON, DEFENDANT

[Filed U.S. District Court Eastern District Arkansas,
November 1, 1979, W. H. McClellan, Clerk
By: _____]
Dep. Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 27, 1979, the defendant, Jeffrey Joseph Benson, was arrested while seated in a parked vehicle at the Little Rock Municipal Airport. The defendant's arrest was the culmination of surveillance which had been initiated as a result of information received by law enforcement officers from a confidential informant. During the course of the defendant's arrest law enforcement officers seized approximately six (6) ounces of a powder substance later identified as cocaine. The indictment in the above captioned case followed. On Friday, October 26, 1979, this court conducted an evidentiary hearing for the purpose of considering factual questions raised by defendant Benson's motion to suppress evidence. At the conclusion of the evidence the court announced its ruling denying the defendant's motion to suppress and the bases therefore. Because of the importance of the issues presented by the motion to

suppress, however, the court informed the parties that formal findings of fact and conclusions of law would be prepared and filed. Accordingly these findings of fact and conclusions of law are submitted as the court's memorandum of decision with respect to the defendant's motion to suppress.

I.

CONTENTIONS OF THE PARTIES

Defendant Benson contends that the cocaine seized during his arrest is inadmissible at trial because the search which produced the cocaine was unlawful. The warrantless search was unlawful because the defendant's warrantless arrest was unlawful. The underlying arrest was unlawful because the arresting officers allegedly lacked sufficient probable cause to arrest the defendant. The arresting officers did not have probable cause to arrest the defendant because the arrest was based on information obtained from an "unreliable" informant. Defendant Benson contends that the informant was unreliable because he had not previously provided information to law enforcement officers which had led to the arrest and/or conviction of another person and the law enforcement officers involved had no basis for concluding that the informant was reliable.

The government, on the other hand, contends that the warrantless search of the defendant was constitutionally permissible as a "search incident to a lawful arrest". The government further contends that there was adequate probable cause to support defendant Benson's warrantless arrest.

It is obvious from the contentions of the parties that the validity of the search and, hence, the admissibility of the fruits of the search, hinges upon the legality of the defendant's arrest. It is equally clear that the "lawfulness" of the defendant's arrest depends on the existence of probable cause and that probable cause, under the circumstances presented, depends in turn on the reliability of informant Sandy Sandefer.

II.

FINDINGS OF FACT

1. Defendant Jeffrey Joseph Benson was arrested on August 27, 1979 shortly after 6:00 p.m.

2. At the time of defendant Benson's arrest he was sitting in a vehicle which was parked at the Little Rock Municipal Airport. Another man, Sandy Sandefer, was sitting in the vehicle with defendant Benson at the time of the arrest of defendant Benson. Mr. Sandefer owned the vehicle in which defendant Benson was sitting at the time of the arrest.

3. Immediately prior to his arrest defendant Benson had been under surveillance by state and federal law enforcement officers. An informant, Sandy Sandefer, had previously informed the officers of the arrival of an individual, known at that time only as "Jeff", who would allegedly be transporting a quantity of cocaine. Informant Sandefer had told narcotics officers that "Jeff" would depart from Ft. Lauderdale, Florida on the afternoon of August 27, 1979 and that he would arrive at the Little Rock Municipal Airport on a commercial airline flight at approximately 6:00 p.m. Informant Sandefer further told officers that "Jeff" would be carrying a "brown bag" and that the cocaine would be located in the brown bag because such a bag had been utilized to transport cocaine during two previous transactions between "Jeff" and informant Sandefer.

4. Prior to the arrest of defendant Benson, law enforcement officers had been provided with the following information from informant Sandefer: (1) the physical description of an individual known as "Jeff"; (2) that "Jeff" would be transporting cocaine on August 27, 1979; (3) that Jeff would leave on a commercial airline flight from Ft. Lauderdale, Florida on the afternoon of August 27, 1979; (4) that "Jeff" would arrive at the Little Rock Municipal Airport at approximately 6:00 p.m. on August 27, 1979; (5) that Jeff would be carrying a "brown bag"; (6) a description of the "brown bag"; (7) that the cocaine being trans-

ported by "Jeff" would be concealed in the brown bag; (8) that informant Sandefer had purchased cocaine from "Jeff" on two previous occasions and, on each occasion "Jeff" had transported the cocaine in the same brown bag; (9) that "Jeff" and one Bruce Bell were engaged in the unlawful traffic of drugs; (10) that Bruce Bell had called "Jeff" and had arranged for the transportation of cocaine by "Jeff" on August 27, 1979; and (11) that Bruce Bell had told informant Sandefer that he would leave California on a flight for Little Rock, Arkansas on August 27, 1979, and that he would arrive at the Little Rock Municipal Airport at approximately the same time as "Jeff".

5. During the late afternoon of August 27, 1979, state and federal law enforcement officers, acting pursuant to the information provided by informant Sandefer, began a surveillance of the commercial airline flights arriving at the Little Rock Municipal Airport. Informant Sandefer was also present at the airport during the surveillance. He was assigned the task of verifying whether the individual known as "Jeff" had cocaine in his possession. Verification of possession of the drugs was to be communicated by informant Sandefer to law enforcement agents by predetermined signals. If Sandefer confirmed Jeff's possession of cocaine, either verbally or by physical observation, while Jeff was still in the terminal, informant Sandefer was to drop a cigarette. If the existence of the cocaine was not confirmed until Jeff was in Sandefer's vehicle, then informant Sandefer was to flash his headlights to advise officers that Jeff had the cocaine in his possession.

6. At approximately 6:00 p.m. on August 27, 1979, officers observed a man fitting the description of the individual known as "Jeff" deplaning from a commercial airline flight that had just arrived at the Little Rock Municipal Airport. The man was the only passenger carrying a "brown bag". The brown bag fit the description of the brown bag which had been previously described to law enforcement officers by informant Sandefer. The officers maintained their surveillance until the man entered informant Sandefer's vehicle. When the officers observed

the headlights flash on Sandefer's car, they proceeded immediately to the vehicle. As the officers approached the Sandefer vehicle the man turned and reached for the brown bag he had been carrying. He had placed the bag on the rear seat of the Sandefer vehicle. As one officer told the man he was under arrest another officer reached in and got the bag. An immediate search of the contents of the brown bag resulted in the discovery of a white powder substance which was later identified as cocaine. A search of the arrested man's person produced a knife.

7. Defendant Benson's arrest was effectuated without an arrest warrant.

8. The subsequent search of defendant Benson's person and the contents of the brown bag was also done without a search warrant.

9. None of the law enforcement officers involved in defendant Benson's arrest and the searches which followed had had any contact with informant Sandy Sandefer prior to August 5, 1979, less than one month prior to defendant Benson's arrest.

10. Prior to defendant Benson's arrest, informant Sandefer had not provided law enforcement officers with any information which had led to the arrest or conviction of another person.

11. Most of the information furnished by informant Sandefer was given to Trooper Mahone, a member of the narcotics section of the Criminal Investigation Division of the Arkansas State Police. Prior to defendant Benson's arrest, most of informant Sandefer's contact with the law enforcement officers involved in defendant Benson's arrest was through Trooper Mahone.

12. Trooper Mahone was aware, at the time informant Sandefer was providing information to him concerning defendant Benson and Bruce Bell, that state felony drug charges were pending against informant Sandefer.

13. Informant Sandefer provided Trooper Mahone with a variety of information between August 5, 1979 and August 27, 1979. Some of the information proved to be cor-

rect, some of the information turned out to be incorrect and some of the information does not appear to have been verified.

14. Information provided by informant Sandefer to law enforcement officers on the day before defendant Benson's arrest turned out to be incorrect. This information specifically dealt with the arrival of Bruce Bell in Little Rock on August 26, 1979.

15. None of the officers involved in the arrest of defendant Benson, including Trooper Mahone, had done a comprehensive background investigation of informant Sandefer prior to the arrest of defendant Benson.

16. On August 27, 1979, law enforcement officers verified, by physical observation, every piece of information given them by informant Sandefer with respect to the arrival of "Jeff" except the fact of possession of cocaine.

17. After verifying informant Sandefer's information the officers that ultimately arrested defendant Benson had a reasonable basis for concluding that Sandy Sandefer was a reliable informant.

18. The evidence presented at the hearing on defendant Benson's motion to suppress, when considered in its entirety, demonstrates that Sandy Sandefer was a reliable informant. His reliability was not, however, established until the information he had given law enforcement officers was verified by independent observation on August 27, 1979.

III.

CONCLUSIONS OF LAW

1. The Fourth Amendment to the United States Constitution does not prohibit every search but only those which are "unreasonable".

2. Reasonable searches are searches which are conducted in accordance with the safeguards imposed by the Fourth Amendment.

3. A search which is conducted without a search warrant and, hence, without the intervention of a neutral and de-

tached magistrate or judicial officer, is presumptively "unreasonable" within the meaning of the Fourth Amendment to the United States Constitution.

4. Once it has been established that a search occurred which did not comply with the Fourth Amendment's Warrant Clause, the government must then bear the burden of overcoming the presumed invalidity of the search. In other words, the government must bear the burden of establishing that a warrantless search was constitutionally permissible under the relevant circumstances.

5. The exclusionary rule does not require automatic suppression of all evidence seized in a warrantless search.

6. There are recognized exceptions to the mandates of the Warrant Clause to the Fourth Amendment. One such exception is a "search incident to a lawful arrest". If a law enforcement officer discovers evidence of a crime during a search incident to a lawful arrest, then the fruits of the search are admissible notwithstanding the absence of a search warrant or judicial authorization for the search. Two facts must be established before a warrantless search can be justified as a "search incident to a lawful arrest". First, the search must be conducted contemporaneously with an arrest which is lawful. The "lawful arrest" requirement satisfies the Fourth Amendment's mandate with respect to the existence of "probable cause" since a lawful arrest assumes that probable cause, in fact, exists. If, on the other hand, the arrest is unlawful because of a lack of probable cause to support the arrest, then the constitutional justification for dispensing with the warrant requirement vanishes. Secondly, a warrantless search can be justified as a search incident to a lawful arrest only if the scope of the search is limited to the circumstances which permit such an intrusion in the first instance. In other words, a warrantless search cannot be justified as a search incident to a lawful arrest if the search extends beyond the recognized and legitimate scope of a search incident to a lawful arrest. A search of the person arrested and of the area within their immediate access or control is within the permissible scope of a search conducted inci-

dent to a warrantless arrest. *United States* v. *Robinson*, 414 U.S. 218 (1973); *United States* v. *Peep*, 490 F.2d 903 (8th Cir. 1974); *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

7. A search cannot be made lawful by what it turns up. "In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U.S. 581, 595 (1948). Hence, the discovery of cocaine during the course of defendant Benson's arrest is immaterial to a determination of the legality of the search which produced it.

8. Under Arkansas law a law enforcement officer can lawfully arrest a person without an arrest warrant if the officer has "reasonable cause" to believe that the person to be arrested has committed a felony. Ark. Stat. Ann. §43-403 (Repl. 1977); Rule 4.1(a) (i) of the Arkansas Rules of Criminal Procedure.

9. The "reasonable cause" standard imposed by Arkansas law equates with the federal standards of probable cause. *Tweedy* v. *United States*, 435 F.2d 702, 703 (8th Cir. 1970).

10. Federal law enforcement officers may validly and constitutionally make an arrest without a warrant where probable cause exists to believe that the person to be arrested has committed a felony. *United States* v. *Rose*, 541 F.2d 750, 756 (8th Cir. 1976).

11. Probable cause for an arrest "exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *United States* v. *Draper*, 358 U.S. 307, 313 (1959).

12. Probable cause for an arrest may be based on hearsay information such as a tip from a reliable informer. *United States* v. *Draper*, *supra* at pp. 311-312; *Brinegar* v. *United States*, 338 U.S. 160, 172-173 (1949).

13. Where information received from an informant provides a significant portion of the probable cause for an arrest, it must be shown that the informant is reliable. The question of the reliability of an informant must be resolved through the application of two tests: (1) the informant's hearsay tip must reveal some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were; and (2) the law enforcement officers who relied on the informant's tip must reveal some of the circumstances which led them to conclude that the informant was credible and his information was reliable. If either of the foregoing tests are not satisfied, then an informant's hearsay tip cannot form an adequate basis for a finding of probable cause. *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964).

14. "Fourth Amendment analysis relating to a magistrate's assessment of hearsay information presented in an application for a search warrant can apply with equal force to an assessment of the basis for a warrantless arrest by police officers." *United States* v. *Regan*, 525 F.2d 1151, 1155 (8th Cir. 1975).

15. "In assessing probable cause, we take an objective view of all the facts, and the knowledge of all the officers is to be evaluated collectively." *White* v. *United States*, 448 F.2d 250, 254 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

16. Evidence establishing that an informant had not previously provided information leading to the arrest or conviction of another person does not, in and of itself, preclude a finding of reliability. See *McClearly* v. *Sigler*, 406 F.2d 1264, 1269 (8th Cir. 1969), cert. denied, 395 U.S. 984 (1969); *United States* v. *Regan*, *supra* at p. 1156.

17. An informant's reliability may be established by independent corrobation of the information contained in the informant's tip. *Id.* at p. 1156; *United States* v. *Marihart*, 472 F.2d 809 (8th Cir. 1972), cert. denied, 419 U.S. 827 (1972). However, the mere corrobation of information concerning activity which does not, of itself, appear to be criminal in nature is insufficient to support a finding of re-

liability. *Spinelli* v. *United States*, 393 U.S. 410, 415–417 (1969).

18. In the present case, informant Sandefer had given law enforcement officers incorrect information with respect to defendant Benson and Bruce Bell, his alleged co-conspirator, on the day before defendant Benson's arrest. This fact coupled with the additional facts that the officers had not worked with informant Sandefer but for a very short period of time and the absence of evidence of past reliability precluded the officers from concluding that Sandefer was reliable.

19. When, however, informant Sandefer provided a detailed prognostication of defendant Benson's activities on the following day, August 27, 1979, and the officers, by physical observation, corroborated every detail of the information which Sandefer had provided, then, at that point in time, the officers had a basis for concluding that informant Sandefer was reliable.

20. Probable cause to arrest defendant Benson arose at the moment the reliability of informant Sandefer was confirmed, an event which occurred when informant Sandefer flashed the headlights of his vehicle on August 27, 1979.

21. By the time informant Sandefer's reliability had been established and probable cause for an arrest existed, exigent circumstances precluded the officers from applying for an arrest warrant and a search warrant.

22. The government has met its burden of establishing that informant Sandefer was "reliable" under the tests set forth in *Aguilar* v. *Texas*, *supra*, *Spinelli* v. *United States*, *supra*, *United States* v. *Harris*, 403 U.S. 573 (1971) and *Whitely* v. *Warden*, 401 U.S. 560 (1971).

23. Since informant Sandefer's reliability was established it follows that there was probable cause for defendant Benson's warrantless arrest and ample justification for the warrantless search of his person and the area within his immediate control. *United States* v. *Regan*, *supra*.

Submitted this 1st day of November, 1979.

ELSIJANE T. ROY
United States District Judge

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80-1317

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IN THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES OF AMERICA — PETITIONER

VS.

JEFFREY JOSEPH BENSON — RESPONDENT

RESPONSE TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The questions presented whether a warrantless search of an unlocked container within reach of an arrestee conducted contemporaneously with a lawful arrest, may be upheld as a search incident to that arrest.

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STATEMENT

In Response to the Government's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, the Respondent initially suggests that the question presented on Page I of Petitioner's Brief is erroneous and misleading as to the facts in the case at bar. The Petitioner has suggested that the question presented is as follows:

> Whether a warrantless search of an unlocked container, within reach of an arrestee, conducted contemporaneously with a lawful arrest, may be upheld as a search incident to that arrest.

In the case at bar, the unlocked container was the Respondent's luggage. Furthermore, this unlocked container was not within the reach of the arrestee, as it was in fact, in the exclusive control and possession of Detective Hutchinson of the Little Rock, Arkansas Police Department.

The facts are that members of the Little Rock, Arkansas Police Department and members of the Drug Enforcement Agency of the Federal Government, on the advice of an informant, who had never been used before, had gone to the Little Rock, Arkansas airport on the morning of August 27, 1979, allegedly to await for a Bruce Bell and an individual named "Jeff" to arrive in the early morning hours. There was no arrival of either of the individuals, and the members of the Little Rock Police Department and the Drug Enforcement Agency, who had surrounded the airport, took the informant and went back to their previous locations.

Again, on that same afternoon, at about 6:00 P.M., the members of the Drug Enforcement Agency and the Little Rock Police Department once again went to the Little Rock, Arkansas Airport to await the arrival of Bruce Bell and an individual named "Jeff." When the individual named "Jeff" arrived, the informant did not await the arrival of Bruce Bell, but took the individual named "Jeff" to his vehicle, at which time approximately four officers "rushed" the vehicle, when a signal was given by the informant, and arrested the Respondent while another officer removed his luggage from the backseat, and eventually searched the Respondent's luggage for contraband.

The Eighth Circuit Court of Appeals reversed the conviction of this Respondent, relying on the decisions of United States v. Chadwick, 433 U. S. 1 (1977) and particularly Arkansas v. Sanders, 442 U. S. 753 (1979), and also United States v. Schleis, 582 F. 2d 1166 (1978) and United States v. Stevie, 582 F. 2d 1175 (1978), cert. denied, 443 U. S. 911 (1979). It was clear to the majority of the Justices on the Eighth Circuit Court of Appeals, that the Respondent was in the front seat of the car and the bag was in the rear seat of the car at the time of its seizure. More importantly, the bag had been removed by an officer while the Defendant was being held by two other officers and the luggage was in the exclusive control, at the time of the search, of the officer who removed him, and "there was no longer any danger that Benson might gain access to the bag to destroy evidence or grab a weapon."

Clearly, the facts in the case at bar are very similar to the facts in the Arkansas v. Sanders, 442 U. S. 753 (1979).

REASONS FOR NOT GRANTING THE PETITION FOR CERTIORARI

The Respondent submits to this Honorable Court that Rule 17 of the Rules of the Supreme Court of the United States specifies certain considerations governing review on certiorari. Furthermore, the Respondent submits that under the guidelines of Rule 17, there is no reason why a Writ of Certiorari should be granted in this particular case.

In particular, the Respondent states for its reasons for not granitng certiorari as follows:

A. The Eighth Circuit Court of Appeals has not rendered a decision in the case at bar, which conflicts with any other decision of another federal court of appeals on the same matter. Furthermore, the Eighth Circuit Court of Appeals has closely followed the decisions of this Honorable Court, and in particular, the decision in Arkansas v. Sanders, supra, and has certainly not departed from the accepted and usual force of judicial proceedings in this matter.

B. There is no decision of a state court of last resort which has decided a federal question in a way which conflicts with a decision in aother state court of last resort, or in a federal court of appeals.

C. The case at bar does not involve an important question of Federal law which has been decided by a state court

or a federal court of appeals which needs to be settled by the United States Supreme Court. On the contrary, the United States Supreme Court has settled the matters concerning the search of a person's personal luggage in deciding that when you are dealing with a piece of luggage, there is an expectation of privacy, and that such is governed by the Fourth Amendment to the United States Constitution, and that certainly, in the case at bar, when the true facts are analyzed, these officers have more than ample opportuity to obtain a valid search warrant, but merely declined to follow the processes of the law.

The petitioners would have this Court believe that the decision before the Court in New York v. Belton, cert. granted, 80-328 (Jan. 19, 1981) would have some bearing on the case at bar. The Respondent strongly objects to this contention, in that the Belton case does not deal with personal luggage, but with the search of clothing, which may or may not have been within the exclusive control of the police.

The case at bar is readily distinguished from Belton (supra), in that in this case, the Respondent was completely removed from his luggage, his clothing had been search, he had been searched, but his luggage was far removed from him in the exclusive control of a police officer. It would have been

rather a simple task to obtain a search warrant to search the luggage, and that certainly there is a closer factual similarity to the Sanders (supra) case than in the Belton (supra) case.

It has been argued by the Respondent that the conduct of the Little Rock Police Department and the Drug Enforcement Agency officers cannot be tolerated, in that the United States Supreme Court has long held that failure to obtain a search warrant when there was time and opportunity to do so, invalidated what would otherwise be a valid search. Trupiana v. United States, 334 U. S. 699 (1948) and McDonald v. United States, 335 U. S. 451. Despite the Petitioner's argument, it is clear from a reading of the transcript that the officers clearly separated the Respondent's luggage from the idea he may have had a weapon. Such can clearly be seen in the transcript of this case in several situations:

Q. O.K. So, after you saw the lights come on what did you do?

A. I went to the passenger's side of the vehicle, along with special agent, Morris, of the Drug Enforcement. Also present was Detective Hutchinson of the Little Rock P.D. Narcotics and Mike Lowery, also of the Little Rock P.D. Narcotics. Upon getting to the car, I opened the door. I told Jeff,"Police Officer. You are under arrest. Get out of the car." He sat there. I said it again. I said, "Police Officer, you're under arrest.

> Get out the car." Still, he had not made any movement. I started to lean into the car. He turned around sideways in the car. His arm came up the top of the seat. At that time, I thought that he was going to reach into the backseat for a weapon, or the bag. I physically took hold of Jeff and took him from the vehicle. At that time, I was removing him - or when he made his motion to turn around, Detective Hutchinson seized the bag from the backseat.

That even in the police officers' own testimony he was reaching ". . .for a weapon or the bag." Once the bag was removed from his possession and was in the exclusive possession of the police, they should have obtained a warrant, as provided in Arkansas v. Sanders, (supra). This language is found throughout the transcript in testimony by all officers. (tr. pg. 95).

CONCLUSION

In conclusion, the Respondent submits that there is no valid reason that this Honorable Court should be requested to grant a Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit. Furthermore, the Respondent suggests that this Honorable Court should not defer consideration of this Petition, pending its decision in New York v. Belton, in that the Belton case is factually dissimilar from this case, and in fact, this factual situation is precisely what this Court ruled on in the case of Arkansas v. Sanders. In order to protect persons Fourth Amendment rights and to prevent the search of their personal luggage, which could contain any personal item of an individual, without a valid search warrant.

Respectfully submitted,

Q. Byrum Hurst, Jr.
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80-1317

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA — PETITIONER

VS.

JEFFREY JOSEPH BENSON — RESPONDENT

MOTION TO PROCEED INFORMA PAUPERIS

Comes now the Respondent, JEFFREY JOSEPH BENSON, and for his Motion for Leave to Proceed Informa Pauperis in his response to Petition for Writ of Certiorari, states and alleges:

I.

That the Respondent, JEFFREY JOSEPH BENSON, had retained counsel at his trial in the United States District Court for the Eastern District of Arkansas in Little Rock, Arkansas, and same retained counsel prosecuted his appeal to the Court of Appeals for the Eighth Circuit of the United States.

II.

That the Respondent is without funds to continue to prosecute defense of the Petitioners request for Writ of Certiorari and asks leave to proceed under Rule 46 of the Rules of the Supreme Court of the United States.

III.

The Respondent has attached an Affidavit attesting to his indigent status as he can not pay either attorney fees or printing costs.

WHEREFORE, Respondent, JEFFREY JOSEPH BENSON, prays that he be given leave to proceed informa pauperis in his response to Petition for Writ of Certiorari and for all other relief to which he is entitled under the rules of the Supreme Court.

JEFFREY JOSEPH BENSON, Respondent

By: _____
O. BYRUM HURST, JR., Attorney for Respondent

STATE OF ARKANSAS)
)SS
COUNTY OF GARLAND)

VERIFICATION

I, Q. BYRUM HURST, JR., being duly sworn, hereby state on oath that the facts set forth in the foregoing are true and correct to the best of my knowledge, information and belief.

Q. BYRUM HURST, JR.

Subscribed and sworn to before me this 3rd day of April, 1981.

NOTARY PUBLIC

My Commission Expires:

10-2-84

CERTIFICATE OF SERVICE

I, Q. BYRUM HURST, JR., do hereby certify that I have this 3rd day of April, 1981, duly served a copy of the foregoing on the attorney for the Petitioner, by placing same in the U. S. Mail, postage prepaid, addressed to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D. C. 20530.

Q. BYRUM HURST, JR.